APPEAL NO. 033088
FILED JANUARY 8, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on November 3, 2003. With respect to the issues before her, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on March 6, 2001, with a seven percent impairment rating (IR) as certified by the Texas Workers' Compensation Commission (Commission)-selected designated doctor. On appeal, the claimant asserts numerous points of error, including an assertion that the designated doctor is not qualified to issue an MMI and IR certification in this case. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Reversed and remanded.

We first note that the claimant properly points out that the hearing officer's decision and order contains a typographical error. Finding of Fact No. 2 states that the claimant reached statutory MMI on November 12, 2003. The evidence reflects, and the parties agree, that statutory MMI on this claim is November 12, 2002; therefore Finding of Fact No. 2 is reformed to reflect that the claimant's date of statutory MMI is November 12, 2002.

The claimant attached several documents to his appeal, most of which were admitted into evidence at the hearing. In deciding whether the hearing officer's decision is sufficiently supported by the evidence we will only consider the evidence admitted at the hearing. We will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through a lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). With this in mind, and after reviewing the evidence attached to the claimant's appeal, we find that it does not constitute new evidence which requires consideration for the first time on appeal. We note that the claimant appears to assert that the hearing officer failed to consider all of the medical evidence he submitted at the hearing. After careful review of the record, we find no indication that the hearing officer overlooked any of the evidence presented at the hearing.

The parties stipulated that venue was proper in the Office of the Commission; that the claimant sustained a compensable injury on _____; that the

Commission-selected designated doctor is Dr. B; and that Dr. B certified the claimant reached MMI on March 6, 2001, with a seven percent IR. Because of the above stipulations, we find no merit in the claimant's challenge to venue or to the hearing officer's recitation of Dr. B's certification of the date of MMI and the IR.

The claimant testified that he injured his low back while lifting a box on _____. The claimant selected Dr. M, a chiropractor, to act as his treating doctor. The record reflects that Dr. M referred the claimant to Dr. Z for a consultation, which was performed on or about January 4, 2001. Dr. Z noted that physical therapy was helping the claimant's condition, and he advised the claimant to "continue on with conservative and symptomatic therapy, physical therapy, massage, ultrasound, etc., to the lumbar spine." Dr. Z concluded that if the claimant "does not improve within the next [four] to [six] weeks, the [claimant] should be re-evaluated and probably will have a lumbar myelogram and possible disc surgery." On January 18, 2001, the claimant underwent a carrier-requested required medical examination by Dr. P. Dr. P certified that the claimant reached MMI as of that date with a seven percent IR. The seven percent IR was due to loss of lumbar flexion and extension range of motion under Tables 56 and 57 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). No rating was given for specific disorders or neurological deficit. Dr. P's certification was disputed, and the Commission selected Dr. B to act as designated doctor. Dr. B examined the claimant on March 6, 2001, and certified that the claimant reached MMI as of that date with a zero percent IR. In his report, Dr. B states the following:

> It is my finding, as of the important information that has been given to me, that [the claimant] should be returned to work in a light duty situation for no more than four to five hours for the first four weeks. His bending, lifting, and twisting should be reduced to, limited to almost nothing. He should not be allowed to pick up more than 15 pounds, preferably doing office or a desk type work. After this period of time, he should be slowly integrated back into his daily job functions as his health permits. The [claimant] was given an [IR] today and placed at [MMI]. The [claimant] also stated that [Dr. Z] states that he would like to try a series of spinal injections for pain. The [claimant] seemed to agree to this protocol and this protocol is within the treatment guideline. I believe that the [claimant] can go ahead with this procedure and still be allowed to be returned to work in a light duty situation.

On February 4, 2003, the Commission sent Dr. B a letter of clarification and included the results of a June 14, 2001, NCV and November 15, 2000, MRI. After review of that information, Dr. B responded by amending his IR certification to seven percent pursuant to Table 49 II(C) for an "unoperated intervertebral disc with medically documented injury and a minimum of six months medically documented pain, recurrent muscle spasm or rigidity associated with moderate to severe degenerative changes on structural tests including an unoperated nucleus pulposus with or without radiculopathy."

Dr. B noted that he did not have any new documents indicating that the claimant had received further treatment, so the date of MMI remained unchanged. On March 12, 2003, Dr. Z performed surgery described as a lumbar laminectomy, interbody diskectomy at L3-4; lumbar laminectomy, interbody diskectomy at L4-5 right; decompression of the nerve root and spinal cord at both levels of L3-4 and L4-5, right; subtotal facetectomy at L4 for decompression of the nerve root; subtotal laminectomy of S1 for decompression of S1 nerve root, right side; epidural dermal fascia fat graft at the level of L4-5, right; and microscope and midas-rex used. On May 7, 2003, the Commission sent a second letter of clarification to Dr. B and included the operative report. On July 18, 2003, Dr. B responded by stating that his opinion regarding MMI and IR remained unchanged from his amended certification of February 16, 2003, which placed the claimant at MMI as of March 6, 2001, with a seven percent IR.

The hearing officer erred in determining that the claimant reached MMI on March 6, 2001, with an IR of seven percent. The hearing officer improperly determined that in order for the claimant's surgery after statutory MMI to be considered it needed to be under "active consideration" at the time of statutory MMI. The notion of whether surgery was actively considered at the time of statutory MMI falls under the rubric of a "reasonable time and proper purpose" analysis, which we have determined need no longer be performed. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a request for clarification is considered to have presumptive weight as it is part of the designated doctor's opinion, without regard to whether an amendment was made for a proper purpose or within a reasonable time. *See also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002 and Texas Workers' Compensation Commission Appeal No. 022618, decided November 27, 2002. Thus, the fact that the claimant's spinal surgery occurred after statutory MMI does not preclude its consideration in determining the claimant's IR. Texas Workers' Compensation Commission Appeal No. 030852, decided May 22, 2003.

In this instance, the designated doctor purports to have considered the surgery in his response to the second letter of clarification sent by the Commission. However, in doing so he does not appear to have followed the protocol of the AMA Guides. A review of Table 49 reveals that the claimant's specific disorder rating would change due to his having undergone multi-level spinal surgery. The designated doctor provides no explanation for his determination that the specific disorder rating did not change and indeed we have previously determined that a designated doctor failed to follow the protocol of the AMA Guides when he refused to assess any lumbar impairment based upon spinal surgery. Texas Workers' Compensation Commission Appeal No. 000832, decided June 2, 2000, and Texas Workers' Compensation Commission Appeal No. 981633, decided August 28, 1998. The designated doctor also does not provide any explanation for his determination that the course of the claimant's treatment following the date of MMI he certified (some 21 months prior to statutory MMI), which culminated in spinal surgery, had no impact on the claimant's date of MMI. Thus, although the designated doctor states that he considered the claimant's surgery, the substance of his response to the request for clarification demonstrates that he did not. Accordingly, we

remand so that the claimant's MMI date and IR can be determined taking into consideration the claimant's spinal surgery. Because the designated doctor was asked to consider the surgery and failed to comply with the AMA Guides in so doing, we believe that no purpose would be served in returning to Dr. B for a third time. Rather, this is a case where the appointment of a second designated doctor is warranted.

The hearing officer's determination that the claimant reached MMI on March 6, 2001, with an IR of seven percent is reversed and the case is remanded for the appointment of a second designated doctor to determine the claimant's MMI and IR taking into account the March 12, 2003, spinal surgery. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS STREET, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701-2554.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Margaret L. Turner
Appeals Judge